

# **EXHIBIT A**

**TRANSCRIPTION OF ORAL ARGUMENT BEFORE**  
**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

*Lincoln Benefit Life Company v. AEI Life, LLC; ALS Capital Ventures, LLC; Joel Jacob; Innovative Brokers; and JRJ Services, Inc.*, No. 14-2660, on appeal from the United States District Court for the District of New Jersey, No. 13-cv-04117

Judge Amrbose: Our last case of this morning, Lincoln Benefit Life Company vs. AEI Life, LLC, et al, number 14-2660. Mr. Gosselin and Mr. Lipsius. Thank you.

Mr. Gosselin: Good morning your Honors, Jason Gosselin for the plaintiff in this case, and the appellate, Lincoln Life. If I may, I would like to reserve five minutes of my time.

Judge Ambro: That's fine.

Mr. Gosselin: The question here is what is sufficient pleading when you are asserting diversity jurisdiction and you have a defendant that is an unincorporated association. In this case, we have a limited liability company.

Judge Ambro: But one of the concerns I had with regard to the argument you made, I mean, is that there's something out there that the other side is relying on that I think can supports you more and that is Emerald Investors. Why didn't you rely on that in asking for jurisdictional discovery in this case?

Mr. Gosselin: Why, I think we asked for a jurisdictional discovery and we thought it was appropriate. I don't think we knew of Emerald Investors at the time that we made our ...

Judge: But it seems to support your position that if there's a question about jurisdiction then you can get some discovery in order to help a court determine if it indeed does have jurisdiction.

Mr. Gosselin: I think that's correct, but I think that there are cases in this Circuit, and in fact, my opponent also cited the decision of Schaumang Industries case from 1964 which is a Third Circuit decision where the Third Circuit at oral argument became concerned that there was not diversity of citizenship, and the court at that point remanded the case to the district court to take evidence on the citizenship question. The case came back up to the Third Circuit and the court had further questions and remanded it again for further discovery on the question of citizenship. So, I think that it's appropriate that if you have a question that the matter ought to be something that becomes the subject of discovery. There was a suggestion that we don't do discovery when we have questions about diversity of citizenship; we only do that when we are talking about questions of personal jurisdiction. I read the cases, I don't think that I see the distinction.

- Judge Ambro: Well it may not be so much of a distinction, except that here, it would be easier than to determine whether you have contacts for personal jurisdiction, possibly could have just one question.
- Mr. Gosselin: Exactly-
- Judge Ambro: Which is are any of your members of the LLC either ALS or AEI, are any of them citizens of Nebraska?
- Mr. Gosselin: Exactly, our point and we sort of skipped over the first part of our argument, is that we actually think that we met our burden or at least our pleading burden under Rule 8 for asserting a shortened plain statement. We've alleged why there's diversity jurisdiction because the two LLC's are citizens of the state of -
- Judge Ambro: Yes, well the LLC's whether one likes the rule or not, you have to look to its numbers.
- Mr. Gosselin: I understand, by implication, the members we asserted are citizens of New York, so for simply for purposes of-
- Judge Ambro: If you have, let's just take, you know, this LLC could conceivably have members in all 50 states.
- Mr. Gosselin: It's conceivable. We've alleged that it's a citizen of the state of New York, by implication, we are alleging that all of its members are citizens of New York. Simply for purposes-
- Judge Ambro: What makes you think that if you can't get into the Secretary of State's files because they don't because the Secretary of States files don't tell you what, who the LLC members are?
- Mr. Gosselin: I think it's a fair question. That is why we've alleged on information and belief the LLC's are citizens of the state of New York. We've done everything possible we could possible do, based on public records. We also, you know, the nature of the case, lists these LLCs actually are single purpose entities-
- Judge Ambro: It seems to me that the answer that you just gave is playing into your opponents hands. By saying, he would say that's why facially this is wrong. You can't say that they are citizens of New York just because happen to have a business in New York. You have to look to where the members are have citizenship, in which states. Now your argument, comes back as "I can't find that out" absent some discovery.
- Mr. Gosselin: Right, I think it's fair, and to be perfectly candid, I think it's appropriate to state, because I believe we've satisfied the Rule 8 requirement. And I think what they've really done is they've made a factual challenge

masquerading as a facial challenge. But the real question here is, if the goal is to get it right, I mean there are times, we happen to think that, and well now know it, at least in respect to one of these entities they really are citizens of New York because all of their members are in New York.

Judge Fuentes: There are two cases in our Circuit, one of which is a 1958 Case, I don't know if you are familiar with it, Underwood v. Thuroni and Local Number 1 vs. International Brotherhood of Teamsters which explicitly says that a plaintiff has to plead the citizenship of every member of an unincorporated association.

Mr. Gosselin: Your Honor, I was not aware of that and I was not aware of any Supreme Court decision or decision from the Third Circuit that said you must identify the individual members of an unincorporated association.

Judge Fuentes: I assumed that this was what the case was saying.

Mr. Gosselin: Fair enough. Then I think we move on to the second portion of this argument, which I think is the more important aspect of it and what we really fought about at the court below. There are times, and this is one of them, when you can't foreclose the possibility by when you do all of your research, that there might be a member of the unincorporated association that you just, you just don't know where they are. So what do you do in that circumstance? The only appropriate thing, I submit, is to permit, as this court has done, in the Schaumang Case, and perhaps in other cases, you permit litigative discovery so that you can find out, where, who are the members, number one, and of which states are they citizens?

Judge Fuentes: I won't quarrel with you in the sense of fairness and the sense of equity and the sense of allowing you to get to first base, but how do you get around these cases? They say you have to plead the citizenship in your complaint of every member of the association.

Mr. Gosselin: Well we can't. To be perfectly candid, and the right response, maybe, because we don't, we believe that all the members, based on what we are able to determine and what we know about these kinds of entities that own life insurance policies, that if they are doing business in New York, they are New York entities. But we cannot foreclose the possibility that there might be a member that is not in New York. So the truth of the matter is, we don't actually know for certain, and in that circumstance, that is when discovery-

Judge Fuentes: Is there any way in which we can say that you have plausibly pled that the members of the association are not from Nebraska.

Mr. Gosselin: Well, we've alleged that the LLC itself, is a citizen of New York and that it can only be a citizen of New York if it's all its members are also citizens of New York. So by implication, we have pled that. Is that sufficient? I

do think it's sufficient under Rule 8. You mentioned those other cases, perhaps it's not sufficient under those other cases. And I think then, we have to recognize there are going to be times, if not this case, there are going to be times when a plaintiff simply doesn't know all if the members. There could be a thousand members of an unincorporated association and a plaintiff is not going to know who they all are and will never be able to meet that pleading standard. What this court has done when there are questions about subject matter jurisdiction, is they've allowed discovery. Now I'll comment-

Judge Fuentes: Well Rule 8 requires that you make a statement in your pleading that contains a short and plain statement of jurisdiction.

Mr. Gosselin: Right, but I think-

Judge Fuentes: But your statement is on information and belief. Is that sufficient?

Mr. Gosselin: I think it is, in the RICO case from the Third Circuit that was the decision that-

Judge Ambro: Like a lot of these cases, you don't have the information and you don't even have enough suspicion to make a belief. Let's say for example you are suing a law firm, a major law firm. And the law firm is an LLC or an LLP. Are you telling me that you can say, on information and belief, they are a citizen of New York? They may be in, you know, ten states. But the problem itself is the facilities, and they may have members in fifty states.

Mr. Gosselin: Your Honor, I agree in the general, in most cases, that is the situation we are going to have. I'm simply saying, in our case, we've had, I know Mr. Lipsius very well. We've had many other cases before, where before these New York limited purpose vehicles owned life insurance policies are all sold by similar brokers. So we know a little bit more about it in this case, but the problem that this case addresses, I think comes up more often in these situations that you're talking about. There are going to be many times when you can't even plausibly assert that this LLC or this limited partnership is a citizen of a specific state because there could be thousands of members and you don't know where they all are. And the rule that, I think, I mean if the rule that gets applied generally, is the rule that was applied in the court in a trial court, then it's very difficult for a plaintiff when there actually is jurisdiction to get his case into court, even though there really is jurisdiction. So the appropriate way to deal with that is to do what some of these other courts have done. And if I can just touch upon, I know I'm coming to the end of my time, the Carolina Casualty Case. That court said well there really isn't an issue. If they answer the complaint and concede that they are citizens of the state that they are alleged to be a citizen of, jurisdiction will be established, we can revisit the issue after they answer the complaint.

Judge Fuentes: Is that the Seventh Circuit Case?

Mr. Gosselin: That was the Ninth Circuit Case, from 2014. That's one way of doing it, that's only-

Judge Fuentes: Other circuits have allowed in the same circumstances?

Mr. Gosselin: That was identical to these circumstances. The reason that's not a complete solution, is because if you have a 12(b)(1) motion coupled with a 12(b)(6) motion, the court, what will the court do with the 12(b)(6) portion of the motion? That's why I think the right way to do this is to allow that very, very limited discovery, and it would not involve much from the court at all.

Judge Fuentes: What happens to your case if you are not able to show-

Mr. Gosselin: Pardon me?

Judge Fuentes: If you are not able to show that we have jurisdiction, what happens to your case? Do you go to state court? Is that right?

Mr. Gosselin: If we can't show that there's jurisdiction? Yes, we would end up in state court. We would probably end up in state court in New York. If I can get to the third way that courts have dealt with this, and I know this because there is a history that occurred after we filed our briefs in this case. When our case was dismissed from the district court, one of these LLCs sued Lincoln Benefit up in state court in New York. So of course we were concerned. We are now in a forum of the defendants' choosing rather than a forum of our choosing which is what we were trying to avoid. But we then looked at the removal rules in the Eastern District of New York, and they actually have a very effective way of dealing with this administratively that involves a little bit of discovery, and I think that this kind of concept is the appropriate way to do it because it makes sure that litigants who belong in federal court can be in federal court. In the case of an original plaintiff making a filing, it allows under the Local Rules, it says a party shall furnish to any other party within seven days after demand a verified statement setting forth if the responding person is a natural person that party residence and domicile in any other state or jurisdiction of which that party is a citizen for purposes of 28 U.S.C. § 1332. There is a similar provision under the same rule for unincorporated associations and there is a similar provision when you are removing a case. If you think you have jurisdiction but you can't state that you do to a moral certainty, but you have a good faith belief that you have diversity of citizenship jurisdiction, you can ask a question, it's one question, actually really sort of one question with two parts but it's who are your members and where are they citizens? Once you get that information, all of these-

Judge Ambro: I suggest it can be even simpler than that in this case: Are any of your members citizens of Nebraska?

Mr. Gosselin: Absolutely.

Judge Ambro: Why don't we hear from Mr. Lipsius and we'll get you back on rebuttal.

Mr. Lipsius: May it please the court, my name is Ira Lipsius, and I represent one of the defendants, Innovative Brokers, in this matter.

Judge Ambro: My question I asked of your opposing counsel – doesn't Emerald Investors entitle Lincoln Benefit at least to jurisdictional discovery?

Mr. Lipsius: And the answer is, I believe, they do not get to first base, and I think the best example that this court can understand-

Judge Ambro: Ok you better tell me what you mean by that.

Mr. Lipsius: Sure.

Judge Ambro: You don't believe that they get to first base. What does that mean?

Mr. Lipsius: They have a pleading that they cannot – their pleading basically says we don't know if there's diversity. Now, I would sue, Your Honor, Judge Ambro, when I have no idea whether you are a resident of Delaware, New York, Pennsylvania, New Jersey, whatever, and I would bring a complaint just purely in federal court and say I'm a resident of New York. I am suing in diversity, Your Honor. And I have no idea where you're a resident of. The court would have to knock that out.

Judge Ambro: But that's easy. It's easy to find out where I'm a resident. It – you cannot find out where all the members of an LLC are by checking records of the Secretary of State, and that's where the district court was just completely wrong. You cannot do that. And so that's the factual mistake, so what I'm concerned about is, what you're suggesting here with regard to this case has a consequence of shielding un-incorporated associations from ever being sued in federal court.

Mr. Lipsius: Okay.

Judge Ambro: And I don't want to go down that slippery slope.

Mr. Lipsius: Well, the answer is and I believe if I cannot find it, it might not be that easy for me to find where Judge Ambro is a resident. Plenty of times, I've had to bring diversity suits against an individual and I could not determine, and I could not in good faith make a pleading alleging. Now I'll give why exactly the example of what the court is asking here of a simple question.

Judge Ambro: In that case, why – just to follow up your example. Ambro the defendant. You have some limited discovery of Ambro and basically, hey Ambro, are you a citizen of New York state? If the answer is no, then you have diversity.

Mr. Lipsius: As a court of limited jurisdiction as the federal courts are, I believe the structure of every court has said that you must have a reasonable belief, a reasonable belief as to residency. I cannot sue – even though that might be a question, Your Honor, I cannot sue-

Judge Ambro: Courts have, courts have jurisdiction to determine their jurisdiction, right?

Mr. Lipsius: Pardon me?

Judge Ambro: Courts have jurisdiction to determine their jurisdiction.

Mr. Lipsius: I believe as long as-

Judge Ambro: That's a basic.

Mr. Lipsius: As long as there's a pleading that at least alleges it. But I believe if you cannot allege this jurisdiction, I have no idea where you are a resident of, I don't believe I can bring action in good faith. It would be dismissed. And in fact, if we look in the pleading here, and I have it in front of me in the paragraph, they don't even allege, when it comes to ALS where ALS is a resident of.

Judge Fuentes: You're comparing the case of one individual as opposed to a limited liability corporation or association that could have 50, 200, 300 individuals.

Mr. Lipsius: Exactly-

Judge Fuentes: Why are you comparing some like apples and oranges?

Mr. Lipsius: I believe that these concepts are the same and I'll give an example which I was about to give. An action was commenced against a client of mine, an LLC, in the southern district of New York and \_\_\_\_\_ I made a similar motion, and the judge said okay, let's have discovery. Okay? It turned out that this defendant had 300 members. And it turned out that of those members, 16 were LLCs so that simple question turned into a literally a nightmare of discovery. It went to the Second Circuit and the Second Circuit actually dismissed it on motion and sent it back to the judge saying please explain, but it actually – that's what happens. If we set a concept here in the law that plaintiffs does not need to know if he has diversity, he can \_\_\_\_\_ information and belief there is diversity. They're saying they have no idea, and conceptually it turns

into a nightmare that anybody that comes to the federal courts have no idea whether there's jurisdiction and it's a case of limited jurisdiction.

Judge Fuentes: But it's just one question. Is anyone a resident of Nebraska. What's wrong with that? It's not complex. It wouldn't take very long.

Mr. Lipsius: Well, when there are – first of all, I believe they don't get to first base meaning that if a pleading is deficient, then a deficient pleading must be dismissed.

Judge Ambro: It is, in their position, it is humanly impossible, I guess, unless they have some sort of organization that can go out and do all this investigation for them one by one, by somehow hacking into the computers of AEI and ALS. That's not realistic. Judge Fuentes's question really is, it is so simple, so efficient then why not do it because it's – it allows us to go forward and see if we have the jurisdiction to do our job or district court to do its job.

Mr. Lipsius: And I believe as the gatekeeper of the district court should not permit people to just bring case in federal court where they have no idea whether there's jurisdiction –

Judge Roth: As the gatekeeper for the district court, should we not consider that plaintiffs have a right to come into court and that LLCs should not be able to avoid jurisdiction by the fact that they are members aren't known? Maybe we need to consider whether LLCs ought to file the names of their members and their residences. Which would you prefer?

Mr. Lipsius: \_\_\_\_\_ There's no difference between an LLC and a partnership.

Judge Roth: Right. Exactly.

Mr. Lipsius: Then we have a long history of jurisprudence which has not permitted the federal courts of limited jurisdiction to accept a lawsuit unless someone has a reasonable belief. There is no reasonable belief.

Judge Ambro: I don't think you're answering her question.

Mr. Lipsius: Okay. And well, I believe if I understand the question, is there a method that the court should use to permit plaintiffs to sue LLCs either by requirement to list their members or partnership or partnerships we sued – that's the law firm example, we would have to list every partnership as soon as they are sued. But I don't believe, and the answer is maybe, we have to change the system. Maybe Congress has to change the law.

Judge Roth: Isn't this easier just to permit the limited discovery when a suit is filed. We have done our due diligence. We are unable to discover the citizenship and request the court to do the limited discovery to ask of the

defendant is any member of the LLC a citizen of the state of Nebraska or whatever state is relevant.

Mr. Lipsius: I believe that does change the jurisprudence of-

Judge Roth: Maybe change it.

Mr. Lipsius: Maybe, maybe it needs a change. I don't know if that \_\_\_\_\_ initially.

Judge Ambro: You know if you have personal jurisdiction issues, sole jurisdiction, and you have a lot of discovery you're going to need to find out if there are sufficient contacts with a particular state in order to exercise personal jurisdiction over that entity or whatever it might be. Here, it is almost exponentially simpler than that. And you're telling us here, that as a matter of common sense, as a matter of judicial efficiency, we shouldn't allow people to have that kind of discovery?

Mr. Lipsius: Well, the question on personal jurisdiction is interesting because of the \_\_\_\_\_ the other decisions –

Judge Ambro: I'm saying if personal jurisdiction discovery can be complicated and this is quite simple, why in the world would you want to oppose having that type of information given to one side and to a court in order for it to determine whether it has jurisdiction?

Mr. Lipsius: And the reason would be that has to be a reasonable belief that the court has jurisdiction. Lincoln here has no reasonable belief so why should –

Judge Ambro: Well, no, now wait a minute. No. They may think there's a darn good chance that no member of these two LLCs are from Nebraska. I think so. I suspect that's the case, but I need to find out.

Mr. Lipsius: That's what they raised in Carolina case and the Carolina case –

Judge Ambro: Time out. I'm just – we're trying – you know, you got to have some common sense here.

Mr. Lipsius: I understand. Yep.

Judge Ambro: What else can they do in order to determine – they suspect that nobody's a citizen of Nebraska but they don't know, and so we're trying to help them in order to know.

Mr. Lipsius: And my answer is, the same thing – if I don't know if I have person jurisdiction, I have no belief whether this company does any business -

Judge Fuentes: Because you can't go to the Secretary of State and get that information. You're saying you can play hidden ball and in your world, back to my point, you're never going to be able to sue an unincorporated association in federal court. I don't think that's going to make up a whole lot of civil procedure people happy. I mean – that would make us a laughing stock in civil procedure world.

Mr. Lipsius: I understand that but the courts, the same way if I sue an individual, if I can't find out where I'm a resident of, I have no right to come into this courthouse. I should be down the block.

Judge Fuentes: The Supreme Court has changed pleading requirements a few years ago and it has said that all a litigant has to do is plausibly plead the right to a claim in order to go to step number two which is discovery. Why doesn't that standard apply in this case also?

Mr. Lipsius: They said they can't plausibly possibly. They, they \_\_ Carolina Casualty case-

Judge Fuentes: They said from information and belief but that's on the basis also of what appears to be a quite exhaustive search. Secretaries of state of several states and only after that can they say, plausibly, we have no defendant is a resident of Nebraska.

Mr. Lipsius: They haven't said that. They said specifically-

Judge Fuentes: By the way, that doesn't necessarily get them to first base. They still have to make certain that none of the defendants are from the state of Nebraska but it will take that one question.

Mr. Lipsius: And the answer is that they don't, they cannot get to first base, unfortunately, and you're right. That's what the idea of a court of limited jurisdiction is. I agree with Your Honor, Judge Fuentes, they cannot get to first base because they don't know. If they had a reasonable belief, they could have amended their pleading. They could have amended the pleading as the court of Carolina Casualty specifically said -- amend your pleading. They remanded, said they can amend the pleading and just say upon information and belief if they have information and belief. But if they don't have information and belief, that would be a violation of the rule.

Judge Fuentes: Are there other circuits that have in fact allowed for limited discovery on this very issue, haven't they?

Mr. Lipsius: Actually none allow it where there is no belief whatsoever. The Seventh Circuit also stated specifically because there was a belief that they then were able to identify members.

Judge Ambro: Don't you have to turn that around? Is it a question of no belief whatsoever, it's that they don't have anything that they know of that indicates that any member is a citizen of Nebraska?

Mr. Lipsius: Well I think it's that they have no idea where – they have no idea where the members are. They don't know if there's one member or 200 members.

Judge Roth: Right. And how can you? It's not available.

Mr. Lipsius: And that's –

Judge Roth: You just can't sue an LLC. Is that your position?

Mr. Lipsius: If you were able to find out who the members are, you can sue an LLC.

Judge Roth: How do you find out?

Mr. Lipsius: Now, with business transactions there are ways to finding out. I'm not saying that we have a way of finding out in this case and it's an imperfect world but uh–

Judge Ambro: This is not a business transaction. This is a dispute.

Mr. Lipsius: I agree. But they did business with these people, during the time the business transaction they could have found out. And I believe it's still --

Judge Roth: So before I do business with an LLC, I want to say up front I need to know the names of all your members and their residences in case I need to sue you sometime.

Mr. Lipsius: Or in state court. There's not a tragedy in going to state court –

Judge Ambro: But it wouldn't be a state court down the block here. It would be a state court in Nebraska.

Mr. Lipsius: Now this could be a state court –

Judge Ambro: Or New York possibly.

Mr. Lipsius: Pardon me?

Judge Ambro: It wouldn't be – you said down the block, but it wouldn't be down the block.

Mr. Lipsius: It would be in either New Jersey or \_\_motions that are not heard in this court\_\_\_\_\_court motion to dismiss because of lack of jurisdiction by one of the defendants, not my client, but it would probably be in New York. That's correct. It's not down the block here, but it would be New

York or possibly, New Jersey, and I believe that's what the – I believe that's what the courts have done throughout on the simple level for suits at the time of diversity that you have to be able to have some knowledge. You can't just take a guess.

Judge Ambro: Does it make any difference to you that the district judge here was wrong in connection with the fact that you cannot search the members of an LLC in Secretary of State's office?

Mr. Lipsius: I don't think that really makes a difference here. I would concede that it is very hard and I've been in this situation myself where I've had to bring lawsuits in state court because I could not in good faith claim diversity if I didn't know it. That's a problem I deal with all the time. I do a lot of litigation. That's what I've been doing for 30 years, and one of the first things I'll do is put in an associate on there to find it and sometimes I can and sometimes I can't, but I believe that's what the courts have held here unless we're changing jurisprudence of the whole rule that there's a discovery process allowed and I have no idea who the other parties' residences is –

Judge Ambro: Actually, all we're following is the lead by analogy of Emerald Investors. Which is our Circuit's case from 2007. Alright.

Mr. Lipsius: Unless – and I do want to make a point that there are cases that, as I said, in the Southern District that I'm involved in, you can have 300 and if we \_\_\_\_\_ there are seven different factors that the courts go into to determine what the residences of these people are. So therefore everyone could be a mini trial on all 300 members of the LLC possibly.

Judge Ambro: What you're looking at to some extent there is personal jurisdiction, are you not?

Mr. Lipsius: No, no, no. Diversity because with the persons involved in this court in recent decisions –

Judge Ambro: I understand –

Mr. Lipsius: A few months ago whether a person voted, a person was asked to resign and it was unfortunately is an issue with where a person's residence is.

Judge Ambro: Thank you.

Mr. Lipsius: Thank you.

Judge Ambro: Mr. Gosslein.

Mr. Gosselin: Very briefly, Your Honor. On this question of this being a business transaction and you can simply account for this when you're entering into

this transaction. What happens here, it reveals that that doesn't really work. We're an insurance company. We issued a policy that was owned by New Jersey Trust. That policy was then transferred to these LLCs and now there's a dispute and we don't sue the old trustee, we sue the current owner of the policy. We didn't choose to do business with ALS or AEI. They just sort of ended up there and I think what the questioning that has come out of this shows is that the courthouse doors really will be closed if you're a plaintiff who happens to be in a dispute with a, an LLC or a limited partnership. You simply won't be able to bring your case in federal court even though there might be jurisdiction. That would be a bad rule. It would also encourage people to take advantage of that if they want to – we have federal courts for a reason. The plaintiff's choice of forum is usually given preference and it would be taking that away from plaintiffs and allowing defendants to organize themselves in a way to keep plaintiffs out of federal court. The goal here should be to get it right and as I think the questioning and the answer is from both me and Mr. Lipsius revealed is that it really would be very simple to make sure we get it right in circumstances like this, so the standard ought to be if we have to allege more, we have to identify the members, we ought to allow that bare minimum of discovery to make sure that the court properly has jurisdiction over the subject matter.

Judge Ambro: Thank you very much.

Judge Ambro: Thank you both counsel. We'll take the matter under advisement.

[end]